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In the Supreme Court of the United States

DENARD MORRIS,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

In its Brief in Opposition the government asserted several arguments against granting the petition, yet it failed to debunk the meritorious questions and arguments raised by petitioner. The government cited little relevant precedent and ignored precedent that supports petitioner's actions. Petitioner has presented important questions to this Court and has survived the government's attempts to discredit his arguments.

Petitioner brought a claim in the Court of Appeals for the Seventh Circuit that the prosecution violated his due process rights by knowingly using false testimony and deliberately misleading the jury, as well as failing to disclose exculpatory evidence. *See* Pet. App. 7a. In holding that the prosecutorial misconduct in *Morris* did not violate petitioner's rights, the Seventh Circuit not only failed to prohibit such flagrant conduct in *Morris*—the court has also blazed a trail that will empower future prosecutors to abuse the due process rights of criminal defendants. Deliberate prosecutorial misconduct, through the knowing use of false testimony combined with a failure to disclose exculpatory evidence to the defense, requires a stricter standard of materiality than the standard applied by the Seventh Circuit.

1. The government beleaguers the point in its Brief in Opposition that petitioner is barred from bringing his claim of prosecutorial misconduct as he did not raise the particular arguments in the court below. *See* Opp. 8. However, the fact remains that petitioner properly raised a prosecutorial misconduct claim in the Seventh Circuit. In his Seventh Circuit

appeal, petitioner claimed that the prosecution violated his due process rights by failing to disclose a sentence reduction and misleading the jury as to the minimum sentence for its sole eyewitness. *See* Pet. App. 7a. Petitioner does not seek to bring a new *claim* in his petition, but rather provides additional arguments in support of his original claim that the prosecutorial misconduct present in his trial violated his rights under the Constitution. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Here, petitioner merely provides an additional argument to support his contention that the prosecution's misconduct violated his right to a fair trial. In particular, petitioner argues that the misconduct that occurred in his case—the knowing use of false testimony, combined with the prosecution's failure to disclose a sentence reduction where the defense had provided a specific *Brady* request—requires a stricter standard of materiality to protect due process rights.

Petitioner's claim in the Seventh Circuit was, and remains, that the prosecutorial misconduct at issue violated petitioner's due process rights. Petitioner only seeks to present a new argument in support of this claim and to present a meaningful question to this Court.[1] "A litigant seeking review in this Court

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[1] Petitioner presents the additional *argument* that the misconduct involved the failure to provide exculpatory materials requested under *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Exculpatory materials were specifically requested at trial, *see* Pet. App. 58a–62a, and the Seventh Circuit held that

of a claim properly raised in the lower courts . . . possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below." *Yee*, 503 U.S. at 535. In his appeal, petitioner followed established Seventh Circuit case law on materiality in arguing that the prosecutorial misconduct violated his due process rights. The government essentially argues that following Seventh Circuit precedent in crafting an argument to that court precludes petitioner from asking this Court to apply a new standard of materiality in cases such as this one involving blatant prosecutorial misconduct. *See* Opp. at 9. The government fails to point to any precedent requiring petitioner to present a novel argument in the court below in order for this Court to grant certiorari. Although a new argument is brought in this Court, the underlying claims brought in the court below remain intact.

The complex set of facts in *Morris*—involving the knowing use of false testimony, combined with a failure to disclose exculpatory materials that had been requested by the defense—does not fit squarely into the Court's prior holdings. In its opinion, the Seventh Circuit applied a "reasonable likelihood of affecting the jury" standard due to the prosecution's knowing use of false testimony. Pet. App. 9a. However, instead of solely involving the deliberate use of false testimony, petitioner's case further involved a failure by the prosecution to provide exculpatory impeachment evidence to the defense.

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the prosecution deprived petitioner of impeachment evidence by failing to disclose to petitioner a potential downward departure under U.S.S.G. § 5K1.1. *See* Pet. App. 7a–8a.

See Pet. App. 8a. Petitioner's case thus bridges the gap between two different lines of cases. One line, derived from this Court's decision in *Mooney*, holds that "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *Giglio v. United States*, 405 U.S. 150, 153 (1972) (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (per curiam)). The other line stems from *Brady*, in which this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In the wake of the Seventh Circuit's decision in *Morris* it is evident that the materiality standard applied by the court was insufficient to protect due process rights where the misconduct not only involves the knowing use of false testimony, but also the failure to provide impeachment evidence requested by the defense.

The government asserts that no facts support the argument that the government disregarded a specific *Brady* request for exculpatory material. Opp. 10. The government attempts to apply the same argument that fell on deaf ears in the Seventh Circuit by stating that the prosecution never explicitly agreed to a downward departure under U.S.S.G. § 5K1.1 prior to trial and thus was not required to disclose it to the defense. *See* Opp. 10. That argument was rejected by the Seventh Circuit when it held that the failure to disclose the possibility of a downward departure to the defense, and the corresponding use of known false testimony to mislead the jury, amounted to prosecutorial

misconduct. *See* Pet. App. 8a–9a. Even if, as the government argues, a competent defense attorney should be aware of U.S.S.G. § 5K1.1, Opp. 10–11 n.3, the Seventh Circuit's holding of prosecutorial misconduct for failure to disclose impeachment evidence implies that such knowledge did not excuse the government from its obligation to inform the defense that it might seek a downward departure.

2. The government misses the mark in arguing that a new standard of materiality is unnecessary due to the fact that courts already address the cumulative impact of government misconduct. Opp. 11 (*citing Berger v. United States*, 295 U.S. 78, 89 (1935); *Solles v. Israel*, 868 F.2d 242, 248 (7th Cir.), *cert. denied*, 490 U.S. 1101 (1989)). On the contrary, a new stricter materiality standard is necessary to prevent the egregious prosecutorial misconduct found in this case and in order to prevent similar misconduct in the future. The Seventh Circuit decision in *Morris* shows that the "reasonable likelihood of affecting the jury" standard, applied where the prosecution knowingly uses false testimony, is insufficient where the knowing use of false testimony is in conjunction with a failure to provide requested *Brady* materials, in violation of both the *Mooney* and *Brady*. The Seventh Circuit's decision in *Morris* amounts to a tacit acceptance of the prosecution's deliberate misconduct. If the Seventh Circuit's application of materiality and its conclusion are allowed to stand, the decision would not only violate petitioner's due process rights, it would also give future prosecutors free reign to deliberately engage in similar misconduct with no repercussions. Such a result should not be allowed by this Court, as this conduct strikes at the heart of

the integrity of the trial. *See Giglio*, 405 U.S. at 153.

3. The government also argues that petitioner's case is not certworthy, as he has not articulated a precise terminology for such a stricter materiality standard. The government, however, fails to cite even one case holding that petitioner is required to explicitly define such a standard. Opp. 11. Petitioner argues that due process requires a stricter standard of materiality for a case that bridges the gap between *Mooney* and *Brady*, involving the prosecution's knowing use of false testimony with its failure to provide exculpatory aterials specifically requested by the defense. Although the "reasonable likelihood of affecting the jury" standard may work effectively for cases solely involving the use of false testimony to mislead the jury, such a standard is insufficient where the misconduct is compounded by a failure to disclose exculpatory materials to the defense. Instead, a stricter standard is needed to prevent prosecutors from engaging in such deliberate misconduct as occurred in *Morris*. Petitioner asks the Court to use its discretion to determine a materiality standard appropriately deferential to due process considerations, as the Seventh Circuit's standard failed to adequately consider the compounded misconduct in his case.

4. The government mistakenly argues that petitioner never made an "as-applied" challenge to his sentence in the lower courts, and therefore his claim is without merit. Opp. 12. The government's reliance on *United States v. Williams*, 504 U.S. 36 (1992), does not support its contention that a sentencing challenge was not made in the court below. Petitioner clearly argued to the Seventh Circuit that the sentencing enhancement based on

acquitted conduct violated his Sixth Amendment rights, Pet. C.A. Br. 31–32; Pet. App. 18a–19a, and that his sentence was unreasonable. Pet. C.A. Br. 34; *see also* Pet. App. 19a. As discussed above, petitioner is free to make additional arguments in support of a claim that has been properly presented in the courts below. *See Yee*, 503 U.S. at 534. In addition, petitioner can present his questions to this Court in any way he chooses and is not limited solely to the questions presented below. *Id.* at 535. Petitioner's underlying claims—that his sentencing enhancements violate the Sixth Amendment and that his sentence was unreasonable—have not changed. Petitioner merely seeks to present additional arguments in support of his claims, as is allowed under this Court's decision in *Yee*.

Justice Scalia recognized in his concurrence in *Rita v. United States* that a Sixth Amendment challenge is available against a sentence that would not have been upheld as reasonable without the existence of judge-found facts. 127 S. Ct. 2456, 2479 (Scalia, J., concurring). Petitioner presents his question based on the ambiguity in this Court's jurisprudence as articulated by Justice Scalia in *Rita* and thereby argues that his sentence violates the Sixth Amendment, as it would not have been reasonable but for an enhancement due to acquitted conduct.

5. The government argues in its Brief in Opposition that petitioner cannot meet the standard he proposes, and thus his claim lacks merit. Opp. 13. The government fails to see the forest through the trees. Reasonableness is not determined in a vacuum; it instead should be evaluated on a case by case basis. As was argued in *Rita*, an appellate

court must evaluate "what motivated the [district court's] individualized sentencing decision." 127 S. Ct. at 2472 (Stevens, J., concurring). Further, in determining a sentence, a district court's particular insights are invaluable. *See Koon v. United States*, 518 U.S. 81, 98–99 (1996).

Despite the presumption of reasonableness for Guidelines range sentences applied in *Rita*, such a presumption is rebuttable, and in petitioner's case the sentence would be unreasonable but for the existence of a sentencing enhancement for gun possession, a charge for which petitioner was acquitted by the jury. The district court sentenced petitioner to 262 months after enhancing his sentence due to its conclusion that he possessed a gun. Pet. App. 3a. As the government noted, no determination can be made for the precise sentence that the district court would have given in the absence of the enhancement for gun possession. Opp. 13 n.4. However, it would defy logic to conclude that a judge would give an identical 262 month sentence both with and without a firearm enhancement. *See* Pet. 21. The only logical conclusion is that without the firearm enhancement, the sentence imposed by the district court in this case would undoubtedly have been lower than 262 months. *See id.* Therefore, the 262 month sentence in *Morris* would be unreasonable in the absence of the sentencing enhancement, and this case provides the Court with an opportunity to clarify an ambiguity in federal sentencing law by addressing petitioner's question.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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